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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 115

LUCKENBACH TERMINALS, INC., A CORPORATION OF THE STATE OF NEW JERSEY,

Petitioner,

vs.

THE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY, NEW JERSEY JUNCTION RAILROAD COMPANY, A CORPORATION OF NEW JERSEY, THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION, AND COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Sec. 237 (a) of the Judicial Code (28 U. S. C. A. Sec. 344 (a)).

The final decree of the New Jersey Court of Errors and Appeals (hereinafter referred to as the Appellate Court), the highest court of the State of New Jersey in which a

decision in the suit could be had, was entered on January 25, 1940 (R. —). Application for appeal is herewith presented on the 11th day of April, 1940.

The statute of New Jersey, the validity of which has been drawn in question, is Chapter 121 of the Laws of New Jersey for the year 1919, pages 285 to 287 (hereinafter referred to as the Apportionment Act), as amended by Chapter 335 of the Laws of New Jersey for the year 1933, page 879, and the same laws as reenacted as Secs. 54: 7-1 to 7-8 and 2:221-40 of the Revised Statutes of New Jersey, 1937, and as so amended, is quoted as follows:

"1. Any municipal assessment, charge or lien against any parcel of real estate may be apportioned among proper sub-divisions of such parcel by the governing body of the municipality in which such parcel is located.

2. The assessments, charges or liens which may be so apportioned shall include any assessment for taxes, any assessment for benefits for local improvements, and any other municipal charge which is or may become a lien upon real estate, and which is or may become due and payable to the municipality, including the claim of the municipality under any sale for the enforcement of taxes or other municipal liens or charges.

3. The apportionment shall be made on the written application of any person interested, or on motion of said governing body without application.

4. The apportionment shall be made according to the values of the respective sub-divisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel.

5. Such governing body may make the apportionment by resolution. A copy of the apportionment shall be filed with the clerk and with the collecting officer of the municipality, and the charge as apportioned to each

subdivision shall then be a charge or lien thereon, in the same manner as if originally so assessed or imposed.

6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality.

7. Notice under the foregoing section shall state the time and place of hearing on such application, and shall be given at least one week in advance by publication in a newspaper in which ordinances of said municipality may be published, and by personal service of a copy of such notice on each person interested who resides in the municipality.

8. Such governing body, either in a particular case or by standing resolution, may direct such apportionment to be made by any municipal official, and may impose such lawful regulations as the resolution shall provide.

9. Any such governing body or authorized officer may refuse to comply with any application for apportionment or reapportionment, unless the written application shall be accompanied by a map showing the entire parcel and the subdivisions desired, and shall also be accompanied by the deposit of a sum sufficient to cover the expense of the notice and advertisement hereinbefore provided, and to pay the estimated amount apportionable to the subdivisions in which the applicant is interested.

10. This act shall take effect immediately."

Sec. 6 thereof provides that "apportionment may be made without notice to interested parties", and petitioner claims that that clause renders the entire Apportionment Act unconstitutional under the "due process of law" clause con-

tained in Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. In *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333, this Court, in reviewing a tax assessment said:

> "That if the state statute did not provide for a notice in any form, it was repugnant to the Fourteenth Amendment to the United States Constitution, and that it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute."

The decision of the Appellate Court appears to be based upon non-Federal grounds, that are not independent and are wholly inadequate and untenable to support its decree and have no fair or substantial basis; and this Court has jurisdiction.

This case also challenges the validity of the tax sale based on such apportionment and presents to this Court, for the first time, the question whether an owner of real estate in New Jersey who has not waived notice of an apportionment, is not entitled, under the "due process of law" clause in the 14th Amendment to the Constitution of the United States, to a notice of an apportionment of taxes levied against such real estate.

This Court has held that a State court, by resting its judgment upon some ground of general law, cannot defeat its jurisdiction if a Federal right was specially set up or claimed, which, if recognized and enforced, would require a different judgment. *Chicago, B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561, 580, 581. Whether a Federal right has been denied, or not given due recognition, by the Appellate Court is a question as to which petitioner is entitled to invoke the judgment of this Court. *Love* v. *Griffith*, 266 U. S. 32, 33. A Federal right having been properly urged in this case,

it is within the province of this Court to inquire, not only whether such right was denied in express terms, but also whether it was denied in substance and effect by putting forward non-Federal grounds of decision that are wholly inadequate and without any fair or substantial support. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Love County*, 253 U. S. 17, 22; *Broad River Power Company* v. *South Carolina*, 281 U. S. 537, 540. If the decision rests upon an unfair and unsubstantial basis, without fair support, constitutional obligations may not be evaded. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co., supra.* Because if non-Federal grounds of decision, plainly untenable, may thus be put forward successfully by the Appellate Court, this Court's power to review might easily be avoided. *Ward* v. *Love County, supra; Terre Haute & I. R. Co.* v. *Indiana*, 194 U. S. 579, 589.

It is respectfully submitted that the asserted non-Federal grounds of decision in this case are wholly inadequate and have no fair or substantial basis, and that this Court has jurisdiction.

The admitted facts are as follows:

In 1920, the petitioner, Luckenbach Terminals, Inc., a corporation of the State of New Jersey, complainant, in the court of chancery of New Jersey (hereinafter referred to as the Trial Court) and the appellant in the Appellate Court, became the owner of record of about 20 acres of unimproved waterfront situated on the westerly side of the Hudson River in New Jersey, and lying partly in the Township of North Bergen (hereinafter referred to as the Township), and partly in the County of Bergen (R. 312 to 319, Ex. C11, par. 1 of Bill R. 16 and 17; admitted R. 101). This tract included a strip of unimproved land about 1010 feet long and from 5 to 8 feet wide and of equal value through-

out lying in Hudson County between the easterly side of the Hoboken and Hudson River Turnpike and the original high water line of the river (hereinafter referred to as the Riparian Tract), and was assessed for taxes by the Township for each of the years 1930 to 1933 as Lot 4-A, in Block 438-C, at a valuation of $500.00 per foot of frontage on the river, or $505,000.00 (R. 17 and 18; admitted R. 101). On January 19, 1931, the Board of Commerce and Navigation of New Jersey granted a permit in writing to the petitioner to fill in the submerged lands lying in front of its holdings, from the original high water line out to the bulkhead line, on condition that the granting of the permit would in no way change or affect the title of the State to, or the character of, the lands lying under water upon which such fill should be placed (R. 19; admitted R. 101 and 321 to 323; Ex. C. 12). In compliance with this permit, the petitioner, by October, 1935, had gradually filled in about 6 acres of submerged lands (R. 19, 40; Admitted 101 and Ex. C. F.). Prior to the year 1932, the county determined to build a new highway traversing from south to north the part of the 20 acres lying in Hudson County, which would require the elimination of the turnpike, and the county also entered into an oral agreement with the petitioner and a written agreement with the defendant-respondent railroad companies (hereinafter referred to as the Railroad Companies) whereby the turnpike would be abandoned and the old right of way of the Railroad Companies would be transferred riverward and such conveyances would be severally made by each of such three principal parties to the others as should be found necessary for the carrying out of the plan, and the county also agreed with petitioner, *inter alia*, that it would assume and pay the proportion of the unpaid taxes that had been, and would be, assessed against the Riparian Tract for the years 1930 to 1933 by the township as should be fairly chargeable against the part thereof to be conveyed

by the petitioner to the Railroad Companies and would pay the expense of the removal of the right of way of the Railroad Companies and of the rebuilding of such right of way and of the transfer to the new site (R. 19, 20; Admitted 101). The county and Railroad Companies in the year 1932 entered into an agreement in writing which provided, *inter alia*, that the county would at its own expense acquire and convey to the Railroad Companies, by warranty deed, without cost to them, a good and sufficient title in fee simple, free from encumbrances, except such rights therein as were reserved to the petitioner, to a lot of land including such part of the Riparian Tract as should be needed for the new roadbed (R. 21; Admitted 102, 300; Sec. 4 of Ex. C7). On or about July 5, 1933, the office of the Engineer of Hudson County made a *verbal* application to the Commissioners of the Township for an apportionment of the unpaid taxes assessed against the Riparian Tract, and on July 5, 1933, a resolution in writing was adopted by three of the commissioners apportioning the unpaid taxes upon the Riparian Tract so that the southerly three-fifths part thereof carried a valuation of $9,000.00 per year and the northerly two-fifths part thereof a valuation of $496,000.00 per year, instead of $303,000 per year to the southerly three-fifths part and $202,000.00 per year to the northerly two-fifths part (R. 42, 43; Admitted R. 104, Ex. G). No notice of said apportionment was given petitioner for nearly nine months and then only by sending to it amended tax bills, during which time petitioner had informed the Railroad Companies that instead of conveying to the county and the county conveying to the Railroad Companies, it would convey directly to them, and instead of a fee the conveyance would be of a perpetual and exclusive easement for railroad purposes only (R. 23; Admitted 104; 241 to 255; Ex. C2). The conveyances were made on March 8, 1934 (R. 23; Admitted 104, 242, Ex. C2, R. 256 to 269, Ex. C3; R. 270 to 278, Ex.

C4; R. 278 to 287, Ex. C5; R. 288 to 296, Ex. C6). On September 12, 1935, the northerly two-fifths part of the Riparian Tract, known after the apportionment as Lot 4 A B, the ownership whereof had been retained by the petitioner, was sold by the Collector of Taxes for the Township for the apportioned taxes unpaid thereon for the years 1930 to 1933 and the unapportioned taxes of 1934, amounting all told to $172,856.59, and the township became the purchaser (Ex. C17; R. 332, 333; R. 26; Admitted 104).

The uncontroverted testimony of one of the firm of lawyers at that time representing the petitioner, is that he saw on February 25, 1937, in the office of the Hudson County Board of Taxation a certified copy of the resolution made for the apportionment, and the further uncontroverted testimony in the case is that the information contained in that certified copy was at once imparted to the officers of the petitioner and proceedings were forthwith instituted by it in the New Jersey Supreme Court for a writ of *certiorari* (R. 191, 192, 198).

The law under which said apportionment was made is Ch. 121 of the laws of New Jersey for the year 1919, entitled "An Act for the apportionment of assessments for taxes and other municipal assessments, charges or liens, "as amended by Ch. 335 of the laws of New Jersey for the year 1933, p. 879 (R. 29; Admitted R. 104).

Other admitted facts are that in order to convey a perpetual easement in a parcel of land of a width of 54 feet to the Railroad Companies it became necessary for petitioner to first acquire from the State of New Jersey a triangular shaped tract of the land that had been filled in and which was treated as submerged lands and which was 48 feet wide at its southerly end and ran northerly about 620 feet to a point, and the conveyance of which was delivered to petitioner on March 8, 1934, nearly nine months after the apportionment, and the easement wherein was conveyed

the same day by the petitioner to the Railroad Companies (R. 278 to 287; R. 22; Admitted R. 103). Said tract included a five foot in width riparian fringe along its riverward side, which was retained by the petitioner when it conveyed to the Railroad Companies in order to preserve in it the preferential privilege of acquiring the adjacent lands lying under water (R. 22; Admitted 103). Prior to this last mentioned conveyance this triangular tract formed part of the lands owned by the State of New Jersey and while so owned it was not assessable for taxes by the Township, *State, Winants* v. *Jersey City*, 42 N. J. L. 349. Therefore, it had never been assessed for taxes, and not having been conveyed until nearly nine months after the apportionment had nothing to do therewith, because Chapter 208 of the General Tax Act of 1903 of New Jersey provides, in Sec. 31, "that in making apportionments the lands shall be assessed in accordance with the values thereof when the taxes come due". The State Supreme Court treated the triangular shaped parcel and the five foot riparian fringe as though they had been owned by petitioner at the time of the apportionment, as shown by its opinion (118 N. J. L. 348), whereas it did not acquire them until nearly nine months after the apportionment, and this was alleged in Paragraph 12 of the bill and admitted at the trial (R. 22, par. 12; Admitted R. 103).

On March 11, 1937, which was within the eighteen months limited after a tax sale for bringing proceedings to obtain a *certiorari* to review such sale (ch. 21 of Laws of N. J. of 1925), the petitioner made application, on affidavits only, to the Chief Justice of the Supreme Court of New Jersey for a writ of *certiorari* to set aside the tax sale and apportionment, and was granted a rule to show cause made on that day (R. 33, Par. 43 of bill; Admitted R. 104), and on page 5 of the brief submitted to the justices of the

State Supreme Court, Sec. 6 of the Apportionment Act, which petitioner contends renders the whole Apportionment Act repugnant to the "due process of law" clause contained in Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, was quoted, and on the argument for the writ, petitioner's counsel also claimed that the Apportionment Act was unconstitutional under that Sec. 1. The opinion of the State Supreme Court (reported in 118 N. J. L. 348), does not mention the constitutional question thus raised and the justices declined to issue the writ, although they allowed a writ as to another part of the 20 acres of land belonging to petitioner. The finding was that the apportionment was not unfair to petitioner and that petitioner had been guilty of such *laches* in bringing the proceedings that no writ of *certiorari* could issue (R. 33 and 34). Under the practice in New Jersey, as laid down by its highest court, a refusal by the State Supreme Court to grant a writ of *certiorari* is a discretionary matter from which no appeal can be taken and is not a final judgment nor *res adjudicata* and the decision could not be pleaded or relied upon in any way as a former judgment. It was so held in *State* v. *Wood*, 23 N. J. L. 560, 561, and *Post* v. *Anderson*, 111 N. J. L. 303, 304. There are also decisions by the highest court of New Jersey that an equitable remedy is not ordinarily barred by mere acquiescence for a period less than the statute of limitations at law in a similar case. The tax sale had to be set aside before or contemporaneous with the apportionment and ch. 21 of the laws adopted by New Jersey for the year 1925, p. 77, allows 18 months after a tax sale for the making of application for a writ of *certiorari* to review it. *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 523 (cited by the Appellate Court in its opinion).

The justices of the State Supreme Court also decided that Sec. 6 of the Apportionment Act included a clause giving

an interested party who did not waive notice the right to apply for a reapportionment on notice (118 N. J. L. 348, 351) and that petitioner should have pursued that course of conduct instead of applying for a writ of *certiorari*. (But see *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333.)

The New Jersey equity cases disclosed that where a tax sale was *void* for any reason, a bill of complaint could be filed in the Court of Chancery of that State to quiet title or to remove the cloud from the title and to have the supposed lien declared void *Welles* v. *Schaffer*, 98 N. J. Eq. 31; *Bogert* v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46, affirmed 41 N. J. Eq. 347; *Smith* v. *Cohen*, 123 N. J. Eq. 419; *McClave* v. *Newark*, 31 N. J. Eq. 472, and so a bill of complaint was filed by petitioner in the Trial Court (R. 16 to 44), and a motion was made by counsel for the Township, at the beginning of the trial, to dismiss the bill, but the Trial Court decided that the decision of the justices of the State Supreme Court was discretionary and was not appealable nor a final judgment nor *res adjudicata* (R. 96), and although the attention of the Trial Court had been directed to cases holding that where a lien on real estate was void for any reason, *laches* is not a bar to relief where the lien was imposed under a law repugnant to the "due process of law" section of the Fourteenth Amendment to the Constitution of the United States. *Mitsch* v. *Riverside*, 86 N. J. L. 603, 610, it held in its final decision that petitioner was barred by *laches*.

The bill of complaint so filed in the Trial Court, alleged, *inter alia*, that the Apportionment Act was unconstitutional in that it provided "that an apportionment may be made without notice to the interested parties" and that "no notice of the intended apportionment was given to petitioner or waived by it, either before or after the apportionment was made, except the sending of amended tax bills to petitioner

nine months after it had been made" (R. 29, 30). No part of the Constitution of New Jersey contains the "due process of law" clause contained in the Fourteenth Amendment to the Constitution of the United States (*Abendroth* v. *N. Y. Elevated R. Co.*, 54 N. Y. Super. Ct. 417; and *Maxwell* v. *Goetchius*, 40 N. J. L. 391). During the trial the question of the constitutionality of the Apportionment Act was argued before the Trial Court (R. 161) and it was argued again in the brief submitted on behalf of petitioner to the Trial Court. No oral argument was made by counsel before the Trial Court after the trial. Besides these arguments, counsel for the Township placed before the Trial Court printed copies of the state of the case, supplemental state of the case and the briefs on both sides that had been submitted to the justices of the State Supreme Court in the proceedings had there (R. 82, *LL.* 3 to 6), and on pages 5 to 7 of the brief thus submitted on behalf of petitioner Sec. 6 of the Apportionment Act was quoted and the "due process of law" section of the Constitution of the United States was quoted as the first point for argument in the brief, so that the Trial Court was made fully aware that we claimed that the constitutional insufficiency of the Apportionment Act under the 14th Amendment of the Constitution of the United States had been violated and was attacked. The answer to the question in the brief for the Township was that it was "purely academic". In deciding the case, the Trial Court held that the petitioner alleged in its bill unfair apportionment and unconstitutionality of the Apportionment Act of 1919, under which the apportionment had been made, but that petitioner was guilty of such *laches* in seeking relief and its failure to prove the fraud compelled a dismissal of its bill, and that being so it was unnecessary to pass upon the unconstitutionality of the act (R. 70 to 74).

The Trial Court fell into error when it failed to decide the constitutional question, for it was necessary to set aside the tax sale before or contemporaneous with the setting aside of the apportionment because petitioner could not proceed with a reapportionment while the tax sale stood, and petitioner had obtained the rule to show cause aforesaid from the chief justice of New Jersey on March 11, 1937, within 18 months after the tax sale, which was held on September 12, 1935, and it is well settled in New Jersey that when a bill of complaint is filed for the enforcement of a legal right the equitable remedy is not ordinarily barred by a mere acquiescence for a period less than the statutory limitation of law in a similar case *Massie* v. *Asbestos Brake Co.*, 95 N. J. Eq. 298; 311; *Paterson* v. *East Jersey Water Co.*, 74 N. J. Eq. 49, 97, affirmed 77 N. J. Eq. 588, and where the act under which the assessment is made is unconstitutional a limitation cannot be imposed for bringing *certiorari*. *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 521.

From the final decree of the Trial Court, filed March 23, 1939, an appeal was taken to the Appellate court (by Sec. 111 of Comp. Stat. 450), and the petition of appeal (Sub-Sec. C of Par. 3 of Sec. 2 thereof), R. 9, stated, *inter alia*, that the bill of complaint filed in said Trial Court alleged "that Ch. 121 of the Laws adopted by the State of New Jersey for the year 1919 was unconstitutional because Sec. 6 thereof provides that such apportionment may be made without notice to the interested parties", and Sub-Sec. (d), in the same paragraph and section (R. 9), stated that the bill of complaint filed in said Trial Court alleged that the Apportionment Act was unconstitutional for the following, among other reasons: Because Sec. 1 of Article 14 of the Constitution of the United States which provides that "No state shall deprive any person of life, liberty or property

without due process of law"; "i. e., said act provides for apportionment of taxes without notice to the parties in interest given either before or after apportionment". There was no oral argument by counsel in the Appellate Court and the brief filed on behalf of petitioner with the judges of that court also contained timely and proper reference to said constitutional question, and a citation of most of the cases herein on the subject (see pp. 4 and 9 of Brief), but the decision of that court affirmed the decree entered in the Trial Court and held that the dismissal of the bill was discretionary, and did not decide the constitutional question aforesaid. It showed, however, that the constitutional question had been considered by it and it held, in effect, that it was not necessary to decide the question because the Trial Court had properly dismissed petitioner's bill; so although the petitioner raised the constitutional question timely and properly in three courts of New Jersey, none of them have decided it.

Sub-section (d) of the petition of appeal (R. 9) charges that the Apportionment Act is in derogation of Sec. 1 of the 14th Amendment to the Constitution of the United States, and quotes the "due process of Law" clause therefrom.

This case having been decided upon non-Federal grounds involving the application of State statutes, it is for this Court to determine whether such application has fair and substantial support or whether it was done for the purpose of evading its jurisdiction. *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540, 543. This Court has indicated that even if the non-Federal ground of decision is based solely upon the construction of a State statute which has no fair or substantial basis, and, in effect, amounts to an attempt to evade this Court's jurisdiction, it will not be bound by such construction. *Knights of Pythias* v. *Meyer*,

265 U. S. 30, 38; *Superior Water, Light & Power Co.* v. *Superior*, 263 U. S. 125, 136.

This Court in deciding the case of the *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux, et al.*, 279 U. S. 737, 744 and 745, said "the right thus specially set up in the State court is a Federal right. Whether it was denied or not given due recognition by the challenged decree, as aforesaid, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for *certiorari*. • • • What we have said of the facts demonstrates, as we think, not only that there was obvious and long continued *laches* on the part of the white order, but also that the circumstances were such that its *laches* barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are: *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 425; *Security Co.* v. *Lexington*, 203 U. S. 323, 333; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190; *C. M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 457, 458; 12 *Corp. Jur.* 1228 and 1229.

Respectfully submitted,

CLARENCE KELSEY,
Counsel for Petitioner.

Appended hereto, and headed Appendix A, Appendix B and Appendix C, are copies of the opinions delivered upon the rendering of the decree sought to be reviewed, and of the opinions filed in the Trial Court and in the State Supreme Court in deciding the case.

APPENDIX "A".

(Opinion by New Jersey Court of Errors and Appeals.)

New Jersey Court of Errors and Appeals No. 219. October Term, 1939.

Between

LUCKENBACH TERMINALS, INC., a Body Corporate, Complainant-Appellant,

and

THE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, COUNTY OF HUDSON, NEW JERSEY JUNCTION RAILROAD COMPANY and THE NEW YORK CENTRAL RAILROAD COMPANY, Defendants-Respondents

Submitted October Term, 1939; decided January 25, 1940.

On appeal from a decree advised by Vice Chancellor Kays, whose opinion is reported in 125 N. J. Eq. 562.

For the appellant: Clarence Kelsey.

For the respondent, Township of North Bergen: Nicholas S. Schloeder.

For the respondent, County of Hudson: Robert H. Doherty.

For the respondents, New Jersey Junction Railroad Company and The New York Central Railroad Company: Wall, Haight, Carey & Hartpence.

The opinion of the court was delivered by

HEHER, *J.*

"The essential question here involved is the validity of the tax and assessment apportionment and the proceedings culminating in the tax sale.

So far as is disclosed by the opinion of Mr. Justice Case, the only question raised before and considered by the Supreme Court in the certiorari proceedings was "whether the taxes and assessments were apportioned in a manner unfair" to appellant here. *Luckenbach Terminals, Inc.* v. *Township of North Bergen,* 118 N. J. L. 348. But the con-

stitutional sufficiency of the statute under which the apportionment was had (Chapter 121 of the Laws of 1919, p. 285, as amended by Chapter 335 of the Laws of 1933, p. 879), and the fundamental validity of the apportionment proceeding itself, were also legal questions cognizable on certiorari. As regards these matters, therefore, there was an adequate remedy at law. *Mitsch* v. *Township of Riverside*, 86 N. J. L. 603; *Walsh* v. *Newark*, 78 N. J. L. 168; *Groel* v. *Newark*, 78 N. J. L. 142; *Meredith* v. *Perth Amboy*, 63 N. J. L. 520; *State* v. *City of Hudson*, 29 N. J. L. 475; *Kirkpatrick* v. *Commissioners*, 42 N. J. L. 510; *State, Weart, Pros.*, v. *Jersey City*, 41 N. J. L. 510; *Pardee* v. *Perth Amboy*, 57 N. J. L. 106; *State, Evans, Pros.*, v. *North Bergen*, 39 N. J. L. 456.

Evidently, as observed by the learned vice chancellor, the incorporation in the bill of complaint herein of the allegations (paragraph 40½) that the apportionment was made by the governing body of the respondent township "with the corrupt design of saving" the County of Hudson "from payment of a large amount of taxes under its • • • agreement" with appellant, "and to exact from" appellant "an unjust amount of taxes" on the plot in question, and that "the amount of taxes sought to be imposed" on said plot, "by said apportionment, was so grossly excessive as to be inconsistent with an exercise of honest judgment", was designed to invoke equitable jurisdiction. But the proofs are utterly devoid of any semblance of support for these allegations; and, in these circumstances, the Chancellor was justified in refusing to entertain jurisdiction of the subject-matter of the bill. In the absence of fraud or other special equity, the validity of a proceeding such as this is fully cognizable at law; and the fact that the party seeking equitable relief has delayed the assertion of his claimed right so long that he is barred from relief at law does not *per se* operate to invest equity with jurisdiction to award a remedy. *Mitchell* v. *Pychlau*, 105 N. J. Eq. 524; *Mackie* v. *Cain*, 92 N. J. Eq. 631; *Roe* v. *Mayor and Aldermen of Jersey City*, 79 N. J. Eq. 645; *Goodwin* v. *Millville*, 75 N. J. Eq. 270; *Jersey City* v. *Lembeck*, 31 N. J. Eq. 255; 21 C. J. 47.

There is no occasion for the application of the principle, grounded in the propriety of avoiding a multiplicity of suits, that when a court of equity has jurisdiction of a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all matters at issue. The allegation of fraud was not proved. It is not necessary to deny jurisdiction in this situation; it suffices to say that Chancery was justified in declining jurisdiction. The rule invoked is permissive rather than peremptory in its operation; the assumption of jurisdiction in such circumstances rests largely in the sound discretion of the Chancellor. *Brown* v. *Edsall*, 9 N. J. Eq. 256; *Little* v. *Cooper*, 10 N. J. Eq. 273; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576; *Collier* v. *Collier*, 33 A. 193; *Mayor and Aldermen of Jersey City* v. *Gardner*, 33 N. J. Eq. 622; *Lodor* v. *McGovern*, 48 N. J. Eq. 275; *Hubatka* v. *Maierhoefer*, 65 A. 1002; *Stout* v. *Phoenix Assurance Co. of London*, 65 N. J. Eq. 566, 573; *Shaw* v. *Beaumont Company*, 88 N. J. Eq. 333; 21 C. J. 137, 140, 143. The fact that appellant now asserts an invasion of his constitutional rights does not oblige Chancery to entertain jurisdiction. As stated, such ground of invalidity was cognizable in the certiorari proceedings, and there was therefore an adequate remedy at law in this respect. A special equity cannot be made to rest upon the failure to raise the question in those proceedings. Compare *Vaughn* v. *Johnson*, 9 N. J. Eq. 173.

The circumstances that, in the exercise of its discretionary judgment, the Supreme Court denied appellant's application for the allowance of a writ of certiorari, and that no appeal lies from that determination, does not constitute either a special equity or the want of an adequate remedy at law. *Williams* v. *Audubon*, 96 N. J. Eq. 459. The denial of the application for the writ was not grounded in the hypothesis that it was not an appropriate and available remedy under the circumstances presented, but rather that on the merits appellant was not entitled to relief. The claim of "unfair" apportionment had not been sustained. As to whether laches and estoppel may bar relief in a case involving constitutional deficiency, see *Meredith* v. *Perth Amboy, supra.*

Decree affirmed."

APPENDIX "B".

(Opinion by Court of Chancery of New Jersey.)

Opinion of Kays, V. C.

Dated—March 23, 1939.

Messrs. Kelsey & Ludwig, solicitors for complainant.

Mr. Nicholas S. Schloeder, solicitor for defendant, Town of North Bergen.

Mr. Robert H. Doherty, solicitor for defendant, County of Hudson.

Messrs. Wall, Haight, Carey & Hartpence, solicitors for defendants, New Jersey Junction Railroad Company and The New York Central Railroad Company.

KAYS, V. C.:

"The bill in this case was filed by the complainant, a taxpayer, against the Township of North Bergen, the County of Hudson, the New Jersey Junction Railroad Company and The New York Central Railroad Company presumably for the purpose of quieting title to certain lands claimed by the complainant. The bill deals with a tract of land in the Township of North Bergen along the Hudson River and is described as Plot 4-AB in Block 438-C. The bill prays that the Township and County be restrained from enforcing a tax sale and the apportionment of said land, on the ground that the apportionment and tax assessments are fraudulent, *ultra vires*, illegal and void. Complainant owned land adjacent to the Hudson River in said Township as well as a strip of ripa lands. Bordering on the ripa lands is a highway known as the Hoboken and Hudson River Turnpike. West of the turnpike and about parallel thereto are located the tracks and right-of-way of the New Jersey Junction Railroad Company, which railroad is operated by The New York Central Railroad Company, as lessee.

The County of Hudson made certain improvements to the turnpike and in this connection eliminated two railroad grade crossings. This required certain changes in the alignment of the highway and thereby increased the amount

of complainant's lands. However, it encroached upon complainant's ripa lands.

As a result of these changes certain conveyances were made between the parties in accordance with an agreement entered into between the complainant and the railroad companies. The Township was not a party to this agreement. The County Engineer of Hudson had some informal arrangement with Mr. Stefferson, counsel and secretary of the complainant. They worked out a plan satisfactory to both. Under this plan the County was to reimburse the complainant its cost of acquiring from the State of New Jersey a new strip of land along its ripa lands which was to be eventually taken over as part of the railroad bed as relocated. The County was to assume payment of taxes due on that portion of the old ripa lands which were to be transferred to the railroad company. The lands affected by those proceedings were then described on the tax records of the Township as "Lot 4-A, in Block 438-C".

On July 5, 1933 the Board of Commissioners of the Township adopted a resolution to apportion the tax liens for the years 1930 to 1933 inclusive against the land in question. By this resolution the former plot was described as "Lot 4-AA, in Block 438-C" and as "Lot 4-AB, in Block 438-C". It does not appear, however, that the tax map of the municipality was changed to show the outlines and dimensions of these new apportionments. Mr. Stefferson, however, who carried on the negotiations for the complainant was notified by the County Engineer of Hudson County in December, 1933 that the apportionment had been made. He also told Mr. Stefferson that complainant would not be required to pay taxes on the property transferred, as such taxes would be paid by the County.

The conveyances above referred to were made in March and April, 1934. Complainant received three separate sets of tax bills covering the lands in question and other properties belonging to complainant for the years 1930 to 1933 inclusive. The first set of bills covered Lot 4-AA and Lot 4-AB, in Block 438-C. Another set of bills which were receipted contained assessments on Lot 4-AA in Block 438-C covering the years 1930 to 1932 inclusive and the first half of 1933. The bill for the second half of 1933 for said lot

was cancelled by resolution of the Township. A third set of bills for the year 1933 against Lot 4-AB, in Block 438-C was submitted to the complainant and bore a rubber stamp as follows: "Apportioned by Resolution Board of Commissioners, Jul. 5-1933, Corrected Bill."

Mr. Stefferson submitted at least some of these bills to the attorneys for the railroad company. He testified that he paid no particular attention to the assessment covering Lot 4-AA although he admitted that he did not understand them and made some effort to ascertain what properties they covered. Subsequently he turned over all these bills to the Treasurer of the complainant. Mr. Stefferson made no inquiry of the tax assessor as to what property was covered by Lot 4-AB which was assessed for $496,000.00, the tax on which was $26,000.00 per year. A letter, telephone call or personal call on the tax assessor would have immediately disclosed what property was included in Lot 4-AB. Nothing was done by complainant until April, 1936 when the matter was placed in the hands of Kelsey and Ludwig of Jersey City in connection with some matters of tax on personal property. In the meantime the Township had sold the property at tax sale on September 12, 1935 for nonpayment of taxes. The property at the tax sale was bid in by the Township.

In March, 1937 the complainant here, applied to the Chief Justice for a writ of certiorari to review the apportionment on the ground that it was unfair. The application was denied. An application for the writ was renewed before the Supreme Court and again denied as far as the assessment, tax and apportionment of the lot in question is concerned. See *Luckenbach Terminals* v. *Township of North Bergen*, 118 N. J. L. 348.

The bill of complaint which was filed September 13, 1937 alleges unfair apportionment, unconstitutionality of the Act, Chapter 121, P. L. 1919, under which the apportionment was made, and fraud on the part of the municipality. The proper method to attack the apportionment is by certiorari. It is well settled in this State that the review of such proceedings by a municipal body, is by certiorari, in the absence of special equities or acts ultra vires. The Supreme Court refused the writ to review the matters of assessment,

tax and apportionment. This Court is now asked to determine those same questions. The bill evidently was intended to give this court jurisdiction by the insertion of paragraph 40½ as the other allegations of the bill appear to set up matters which had been argued before the Supreme Court.

I find nothing in the evidence which establishes a so-called corrupt design on the part of the municipality or the County. The Supreme Court on the same facts expressed the view that the complainant was in grave laches. As above stated, the Supreme Court is the proper tribunal to review the proceedings which it has already refused to do. That being so, this court cannot now in the absence of proof of special equities review them. Even if this court could review such procedure, it seems to me, as was apparent to the Supreme Court, the complainant is in laches. The inquiry relative to the assessment was not pursued with diligence. Courts are loathe to interfere with the collection of public revenues. In order that this court may interfere, a party must bring his case strictly within the bounds of equity jurisprudence. Such party must promptly seek his remedy. Complainant's failure to prove fraud or "corrupt design" and its laches in seeking relief compels a dismissal of the bill. This being so it is not necessary to pass upon the constitutionality of the act."

APPENDIX "C".

(Opinion by New Jersey Supreme Court.)

NEW JERSEY SUPREME COURT.

Before Justices Lloyd, Case and Donges.

For the prosecutor, Kelsey & Ludwig (Clarence Kelsey).
For the township of North Bergen, Nicholas S. Schloeder.
For the county of Hudson, Robert H. Doherty.

The opinion of the court was delivered by

CASE, *J.*:

Prosecutor seeks a writ of certiorari to review the apportionment of certain taxes and assessments, and also the proceedings leading up to and including the sale, on September 12th, 1935, of some of the affected lands for taxes for the years 1930 to 1934, inclusive. The underlying ques-

tion is whether the taxes and assessments were apportioned in a manner unfair to prosecutor.

The lands are in the township of North Bergen, county of Hudson, a part bordering and the remaining part near to the Hudson River. Prosecutor owned certain of the upland and also a strip of the ripa made valuable by the right, which attached thereto, to purchase from the State of New Jersey the contiguous underwater land. At the water's edge was the ripa owned by prosecutor. Bordering thereon was the highway known as the Hoboken and Hudson River Turnpike. Next beyond the highway, and parallel therewith, was the New Jersey Junction Railroad Company, operated by the New York Central Railroad Company as lessee. Still beyond and abutting the railroad lands were the prosecutor's uplands. Traffic conditions made it desirable to build a new and modern highway and to eliminate two railroad crossings by reversing the relative locations of the highway and the railroad and, for further efficiency, to shift the turnpike and the railroad some feet easterly, that is, towards the river. That shift increased the acreage of the prosecutor's uplands but encroached upon its ripa. The ends were amicably attained by the exchange of deeds and the making of money payments in accordance with an agreement entered into between the parties. The result was that prosecutor obtained additional ripa land (carrying, of course, an added quota of riparian rights) from the state board of commerce and navigation at a cost of $5,000 (which, however, was reimbursed to prosecutor by the county of Hudson), received the further sum of $60,000.00 in cash and a credit of $4,350.09 on account of arrears in taxes, payment of which was assumed by the county of Hudson; in return for which prosecutor conveyed to the county and the railroad company the rights of way and easements necessary for their purposes, retaining, however, a five-foot fringe of ripa along the river and also specifically reserving all riparian rights incident to any of the lands or rights of way conveyed out; and prosecutor made a payment of $500.00 to the railroad company. The reason for the purchase from the state board of commerce and navigation was that at that point the high water

mark, for reasons that do not appear, had moved appreciably eastward, that is, in the river direction, and the state had, or claimed to have, title to the accretion. The rights of way granted by the prosecutor to the railroad company extended from south to north along approximately three-fifths of prosecutor's ripa lands. The conveyance to the county seems to have no substantial bearing upon present issues. In July, 1933, the taxes were apportioned on the basis of the new holdings. Prosecutor's ripa lands had been assessed at $505,000. On July 5th, 1933, the assessed valuation was apportioned $9,000 to that part of the tract to be occupied by the railroad company and $496,000 to the portion retained by the prosecutor. The contention of the prosecutor is that the entire assessment, that is to say, $505,000 should have been apportioned upon the basis of lineal footage, viz., three-fifths to the railroad company and two-fifths to the prosecutor. That argument, in our opinion, is without substance. The great value of the assessed lands lies, not in the right of way conveyed to the railroad company, but the riparian rights which go with the land binding on the high water line. Not only did the prosecutor retain title to the ripa in the area calculated by it to be two-fifths of the whole, wherein it conveyed no rights whatever, but it retained unencumbered title to a five-foot strip along the water front of the remainder of the tract, as well as title to the fee in so much of that remainder as constituted a right of way to the railroad company. Not only that, but it obligated the railroad company to permit the latter's name to be used by prosecutor as claimant to the riparian rights if and when that should become necessary in order to obtain for prosecutor the conveyance to it of all the underwater lands.

It appears to us that, upon the showing made, the apportionment was not unfair to prosecutor.

But aside from that we are of the opinion that prosecutor is estopped by its laches from obtaining the desired review by writ of certiorari other than as hereinafter allowed. The apportionment for the years 1930 to 1933, inclusive, was made in July of 1933. Prosecutor contends that it was not given the preliminary notice of that apportionment required by the statute; but it admits that it received knowl-

edge of the apportionment in April, 1934, at or immediately after the transfers of title, at which time the prosecutor received receipted duplicates of the tax bills (amended in accordance with the apportionment) which the county of Hudson was, by the agreement, obliged to pay. Prosecutor also received at that time amended tax bills, corrected in accordance with the apportionment, for the taxes which were due from it. Neither then nor at any other time did it seek a reapportionment as permitted by the statute: "Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice * * *." Pamph. L. 1919, ch. 121, Sec. 6.

When prosecutor should have acted to correct the alleged error, it did nothing. It remained quiescent while the changes and improvements, including the building of a modern highway past its lands, were concluded and while, and for a long time after, the township concluded its proceedings for the sale for unpaid taxes; indeed until March, 1937, when application for a writ of certiorari was made. That it may not do. Conf. *Hillside Land Co.* v. *North Bergen*, 112 N. J. L. 576; affirmed, 114 Id. 156. It is in laches, gross laches.

It is, however, conceded, that there was an overcharge of $1,000 in the interest calculated on the plot 7B tax. Respondents say on their brief that the municipal authorities have offered to correct the error; but the error remains uncorrected. While we may assume that the township stands ready to do as suggested and that the prosecutor may, if it chooses, obtain that correction without further delay or expense, nevertheless prosecutor seems to be entitled to a writ to review the sale based upon the erroneous interest calculation. *Rellstab* v. *Belmar*, 58 N. J. L. 489; *Caulfield* v. *Jersey City*, 1 N. J. Mis. R. 573. We are unable to determine, from the proofs before us, the precise situs of plot 7B, or whether the sale of that plot was separate from or embodied in the sale of the remaining parcels. But the writ will go as to that plot alone and to the sale thereof, not to the assessment, the tax or the apportionment. No costs are allowed on this application.